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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5053

VERNON ROUNDTREE,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

for FSP

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Synopsis of Previous Proceedings

Petitioner now applies for a Writ of Certiorari for the purpose of reviewing an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated June 10, 1974, which, upon a memorandum opinion (45 App. Div. 2d 731), unanimously affirmed a judgment of the Supreme Court of the State of New York, Kings County, entered on April 10, 1972, convicting him, after a trial by jury, of Robbery in the First Degree and Grand Larceny in the Third Degree and sentencing him to concurrent terms not to exceed ten years and four years on the respective convictions.

Following the affirmance by the Appellate Division, petitioner sought leave to appeal to the Court of Appeals of the State of New York. His application was denied on July 5, 1974, by Hon. Charles D. Breitel, Chief Judge of that court.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC § 1254(1). We note that that statute is inapplicable herein as it governs petitions to review decisions of the federal courts of appeal. However, insofar as petitioner asserts that the rights secured to him by the Fourteenth Amendment of the Constitution of the United States have been abridged, he may properly rely on 28 USC § 1257(3) to establish jurisdiction for his petition.

Statement of Facts

On February 1, 1971, Benedicto Espino was the victim of an armed robbery. By Kings County Indictment No. 1575/1971, filed on May 25, 1971, petitioner and co-defendant Murphy Tarverel were charged with the crimes of Robbery in the First Degree and Grand Larceny in the Third Degree in connection with that incident.

On November 4, 1971, proceedings commenced on the aforementioned indictment. A *Wade* hearing was held and thereafter petitioner and Tarverel were tried. The petitioner was found guilty as charged. Tarverel was acquitted of both counts.

Wade Hearing

Upon petitioner's motion, a hearing was held to test the admissibility of the potential identification testimony of the People's witness. Petitioner does not now challenge the hearing court's determination that there was no constitutional ground requiring the exclusion of such testimony. Therefore, the evidence adduced at the hearing is not discussed here.

The Trial

The Case For the People

BENEDICTO ESPINO, a married man with five children, was employed as a driver for the Futura Bay Co. private taxi service. He used his own car, a 1964 Ford Falcon automobile, which was equipped with a two-way radio but had no partition between the front and rear seats (149-150, 187, 189).*

At approximately 8:30 p.m. on February 1, 1971, the witness received a radio call directing him to pick up two passengers at the corner of Fulton Street and Franklin Avenue in Brooklyn and he proceeded to that location. As he approached the intersection, he saw the petitioner and Tarverel standing on the corner wearing heavy coats with hoods that covered their heads but left their faces clearly visible. Espino drove the car to the corner and the two men approached. During the short conversation that followed wherein the men identified themselves as the ones who had called for the cab, the witness had the opportunity to get a good look at their faces (149-155, 174-176, 192).

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* Numbers cited in parentheses refer to pages of the transcript of the proceedings herein.

The petitioner and Tarverel then entered the cab and the witness switched on the overhead light and turned to face his passengers to ask them where they wanted to go. Tarverel replied that he wanted to go to Pacific Street between Howard and Saratoga Avenues. Petitioner asked to be taken to Broadway and Howard Avenue. Again, during this conversation, the witness looked directly at the two men's faces (154-157, 178).

Espino then switched off the light and began driving to the requested locations. Periodically during the drive, he glanced into his rear view mirror and looked at the passengers in the back seat. Some 20 or 25 minutes later, after having tr: velled 15 or 20 blocks, Tarverel suddenly ordered Espino to stop the car (158-160, 191, 196, 203-204).

As the vehicle came to a halt, Tarverel produced a gun and the petitioner drew a knife. Both weapons were placed at the witness' neck and a holdup was announced. Petitioner climbed onto the front seat and turned off the ignition. The two assailants then began to search Espino's shirt and trouser pockets. Tarverel found some cash in one of Espino's pockets. Petitioner found and took the witness' watch, his wallet, a religious medallion of St. Barbara and some cash (160-164, 196-197).*

During the search, the assailants kept the witness' head pinned against the steering wheel. However, Espino somehow managed to open the car door and throw himself out

* In court, the witness identified a Wittenauer watch, a wallet and its contents, and a medallion of St. Barbara as those items taken from him during the robbery. He also identified a knife as being the one used by the petitioner during the commission of the crime. On the witness stand, Espino expressed uncertainty as to whether petitioner had retained the property he took or had passed the items back to Tarverel (170-173, 199-200, 207).

onto the street. The two passengers immediately followed him out of the cab and came toward him, each still holding a weapon. As they came to within six or eight feet of him, he picked up an empty beer can and started to run. A shot was fired and the witness began shouting for help. The assailants then fled in opposite directions (164-166, 184).

The witness decided to pursue the petitioner and did so from a distance of some thirty feet behind him. Several times during the chase, the petitioner turned and made threatening gestures with the knife. Each time he did so, Espino retreated, continuing the pursuit when petitioner turned again to run. During the chase, Espino saw a patrol car and flagged it down. An officer rushed to his aid and he pointed out the fleeing petitioner. The witness then observed the officer pursue, apprehend and return the petitioner. Espino identified the prisoner as one of the two men who had just robbed him (166-169, 201).

Thereafter, the witness gave the officer a description of the second perpetrator. He was then directed to drive his own car to the police precinct and he did so (173-174, 207).

OFFICER DONALD GAVAGAN, SHIELD #3194, was on radio motor patrol on February 1, 1971. At approximately 9:00 p.m., he passed a double-parked 1964 Ford Falcon automobile on Dean Street near Saratoga Avenue in Brooklyn. A few moments later, he saw Mr. Espino waving his arms and calling for help. The officer exited from the radio car and ran over to Espino to render assistance (211-213, 228).

A brief conversation ensued during which the officer's attention was directed to a nearby schoolyard wherein for the first time, at a distance of between 150 and 200 feet, he saw the petitioner in flight. Without ever losing sight of

him, the officer pursued and overtook the petitioner and ordered him to stop. He stopped running and began to walk as the officer came toward him (213-216, 228-233).

The approaching patrolman then saw the petitioner throw a metal knife and a black wallet to the ground. He retrieved those items and placed the petitioner under arrest. Thereafter, he subjected the petitioner to a search and discovered in his possession a St. Barbara medallion, a Wittenauer watch and twenty-nine one dollar bills (217, 220-222, 232-233).*

The officer ordered the petitioner into the radio car and directed Mr. Espino to drive his own car to the police precinct (227).

OFFICER WILLIAM GREGORIO, Shield #10469, was on patrol in a radio car with his partner, Officer Gavagan, on the evening of February 1, 1971. At approximately 9:00 p.m., they passed a double-parked 1964 Ford Falcon automobile on Dean Street in Brooklyn. Immediately thereafter Gregorio observed Mr. Espino waving his arms and pointing. The officers drove up to him and the witness observed his partner get out of the radio car, run into a nearby schoolyard and apprehend the petitioner (239-241).

Thereafter, Espino gave a description of a second perpetrator. Petitioner was returned to the radio car and the officers began driving to the precinct. Enroute thereto, they passed St. Marks and Hopkinson Avenue where they noticed Tarverel who appeared to fit the description Espino had given. Gregorio stopped the radio car and stepped out

* In court, the officer was shown the knife, the medallion, the wallet and the watch which were previously identified by Espino. Gavagan identified those items as the ones he had recovered from the petitioner on the night of the incident (218-221).

to speak with Tarverel. When the latter could produce no identification, he was asked to come down to the precinct where he was subsequently arrested. A search of his person revealed no contraband (242-252).

The People thereupon rested and petitioner moved *inter alia* for the declaration of a mistrial, for permission to proceed *pro se* with the assistance of counsel, for the appointment of an investigator or in the alternative, for a jury view of the schoolyard in question, for an order permitting him to be subjected to a "truth serum" test, and for an order committing him to the Department of Hospitals to determine whether he was fit to proceed.

After protracted discussion, the motion to proceed *pro se* was withdrawn and all other motions were denied (255-280).

The Defense

VERNON C. ROUNDTREE, the petitioner, had received the two Welfare checks to which he was entitled on the day of the crime. He cashed one and delivered the other to his landlord as he was required to do. Thereafter he took an examination and had an interview in an attempt to obtain employment with the National Opinion Research Center. As a result, he expected to begin working for that organization within a short period of time (282-286).

He decided to tell his wife of the new employment opportunity but discovered that she was visiting her mother with whom he did not get along. Her mother's home was across the street from the entrance of the schoolyard on Dean Street and at about 8:30 or 9:00 p.m., the petitioner found himself standing in the yard waiting for his wife to come out of her mother's house (281, 283).

Suddenly he noticed a police officer entering the schoolyard and walking toward him. He did not flee. The officer approached and asked him to explain his presence in the yard. He responded that he was simply waiting for his wife to come out of the house across the street (283).

He was thereupon subjected to a search and the officer seized a knife, which petitioner had been carrying in his pocket, and also took his cash. The officer then handcuffed him and began leading him out of the schoolyard (283-284).

As they were walking toward the exit of the yard, they came upon a black wallet lying on the ground. The petitioner refused the officer's request to pick it up asserting that it did not belong to him. The officer then picked it up himself stating his belief that petitioner had in fact thrown it there (284).

The officer returned him to the radio car and showed the cash and the knife to Espino who identified them. Petitioner was then placed in the radio car and a few minutes later, the officers picked up Tarverel whom petitioner had never before met (284-285).

On the witness stand, petitioner emphatically denied having committed the robbery. He denied having had the watch or religious medallion in his possession when arrested. He further denied having possessed either a wallet or cash belonging to Mr. Espino (285, 293-294).

On cross-examination, petitioner conceded the following: in November, 1940, as a result of a criminal conviction, he had spent one year in a reformatory; in March, 1942, he was convicted of petit larceny in Brooklyn; in December,

1943, he was convicted of petit larceny; in January, 1948, he was convicted of possession of a weapon for which he was sentenced to three and one-half to seven years in prison; in November, 1956, he was convicted of petit larceny in Brooklyn; in October, 1957, he was convicted of selling dangerous drugs for which he was sentenced to two and one-half to seven years in prison. Petitioner could not recall whether he had been convicted of larceny in 1939.

Upon application of the defense, the court precluded inquiry into a conviction rendered in Virginia in 1938 for concealing a weapon. That conviction was held to be too remote in time from the proceedings at bar to be considered by the jury (287-292).

The Verdict

At the conclusion of testimony and after due deliberation, the jury returned a verdict of not guilty as to Tarverel on each count. Petitioner was found guilty as charged (456-457).

The Sentence

At sentencing, the court declined to impose persistent felony offender treatment and sentenced the petitioner to a term of imprisonment not to exceed ten years on the robbery conviction to be served concurrently with a term of four years imposed for the grand larceny conviction (Sentencing minutes p. 15).

The Appeal

Petitioner appealed from the aforementioned judgment to the Supreme Court of the State of New York, Appellate Division, Second Department. By an order, dated June 10, 1974, that court, upon a memorandum opinion (45 App.

Div. 2d 731), unanimously affirmed the judgment. Leave to appeal to the Court of Appeals of New York was denied by Hon. Charles D. Breitel, Chief Judge of that court.

Petitioner now seeks a Writ of Certiorari to review the order of the Appellate Division.

It is the Respondents' position that the judgment was properly entered, that the order of the Appellate Division affirming the judgment was likewise proper and that there is no reason offered by the petitioner which is sufficient to persuade this Court to issue the Writ of Certiorari requested.

* * *

POINT I

The trial court did not commit error by allowing inquiry into all but one of the petitioner's prior convictions. In any event, no right secured to the petitioner by the Constitution of the United States was abridged by the court's ruling.

It has long been settled in New York that any witness, including a criminal defendant who testifies at his own trial, may have his credibility impeached through inquiry into his prior criminal convictions. *People* v. *Zabrocky*, 26 N.Y. 2d 530, 535 (1970); *People* v. *Sorge*, 301 N.Y. 198,201 (1950); Criminal Procedure Law § 60.40. However, a rule has arisen in the federal jurisdiction that a trial judge *may in his discretion*, limit the prosecution's right of impeachment when a criminal defendant seeks to testify in his own behalf:

In *Luck* v. *United States*, 348 F. 2d 763, 768 (D.C. Cir. 1965), it was said:

> The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute [14 D.C. Code § 305 (1961)] in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice upon a prior conviction. (Emphasis in original.)

Among the factors held to be worthy of consideration by a trial court in the exercise of such discretion are "the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." *Luck* v. *United States, supra,* at p. 769.

In *Gordon* v. *United States,* 383 F. 2d 936, 940 (D.C. Cir. 1967), cert. denied 390 U.S. 1029, the consideration to be given to the "nature of prior crimes" was more fully explained when then Circuit Judge Burger observed for the court that:

> "[i]n common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity . . . A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; . . ."

See, also, *United States* v. *Di Lorenzo*, 429 F. 2d 216, 220 (2d Cir. 1970), cert. denied, 402 U.S. 950.

It is also certainly arguable that the older a prior conviction, the more remote it is to present credibility. See, e.g., *United States* v. *Allison*, 414 F. 2d 407 (9th Cir. 1969), cert. denied 396 U.S. 968. However, the imposition of rigid age limitations on the use of prior convictions for impeachment purposes has been specifically rejected. *United States* v. *Puco*, 453 F. 2d 539 (2d Cir. 1971).

Thus in *United States* v. *Palumbo*, 401 F. 2d 270 (2d Cir. 1968), cert. denied 394 U.S. 947, wherein the defendant had been tried for counterfeiting allegedly committed in 1967, it was held that there had been no abuse of discretion in the trial court's refusal to preclude inquiry into defendant's prior convictions for "armed robbery in 1929, breaking and entering in 1937, receiving stolen property in 1945, breaking and entering in 1946, and armed robbery in 1956." *Id.* at p. 272. The court so held notwithstanding the fact that in view of the trial court's ruling, the defendant had declined to take the witness stand.

After observing that "most people in making a private decision on a person's credibility would want to know that he had been convicted of perjury or theft." (*Id.* at p. 273), the court observed:

> "At least three if not more of Palumbo's convictions [fell within the class universally regarded as reflecting adversely on a man's honesty and integrity]. It is true that some of them were fairly ancient, but even the more recent ones included receiving stolen property and robbery." (*Id.* at p. 274.)

On the other hand, the same court held that another trial judge had abused his discretion by failing to preclude inquiry into the single 21-year-old narcotics conviction of a defendant charged with a similar narcotics violation. *United States* v. *Puco*, 453 F. 2d 539 (2d Cir. 1971). The court there said that "[t]he chance of prejudice resulting from admission of prior convictions for crimes similar to the one for which a defendant is on trial may be greatest in the case of narcotics convictions because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders." (*Id.* at p. 542, n.9.) On the question of the age of the prior conviction, the court noted:

> "The government argues that *United States* v. *Di Lorenzo, supra* and *United States* v. *Palumbo, supra* upheld for impeachment purposes the use of convictions which were older than Puco's narcotics conviction. However the convictions in those involved fraud and stealing—crimes which bear directly on credibility." *Id.* at p. 543, n.12.

Thus it would seem that in federal courts convictions involving stealing and fraud may be used for impeachment purposes even if they are as much as 38 years old. This is especially so when such convictions have not been "followed by a legally blameless life." *Gordon* v. *United States, supra,* at p. 940.

Further, it is generally recognized that:

> "[t]he evaluation *Luck* requires invariably involves intangibles for which an appellate court's feel is nebulous at best. We do not disturb such highly discretionary adjudications unless the wisdom of doing so is very clear." *Brooke* v. *United States*, 385 F. 2d 279, 285 (D.C. Cir. 1967).

See, also, *Gordon* v. *United States*, *supra*, at p. 939; *Luck* v. *United States*, *supra*, at p. 769.

At the time of the petitioner's trial, the courts of New York had not yet spoken definitively on the questions raised by *Luck* and its progeny although, as in the case at bar, trail courts had in fact begun to make discretionary rulings on so-called "Luck motions" made by criminal defendants. Soon after petitioner's trial, lower courts began to specifically hold that trial courts of New York did indeed possess the discretion to preclude inquiry into past convictions of a defendant seeking to testify in his own behalf. See, e.g., *People* v. *King*, 72 Misc. 2d 540 (Sup. Ct., Queens Co., 1972); *People* v. *Wilson*, 75 Misc. 2d 741 (Sup. Ct., Queens Co., 1973).

Recently, our Court of Appeals has spoken on the precise question. In *People* v. *Sandoval*, 34 N.Y. 2d 371 (1974), the court approved the procedure whereby a trial court exercises reviewable discretion to determine in advance of trial, whether the prosecution will be barred from inquiring into the prior convictions of a criminal defendant for impeachment purposes should he choose to testify.

The court declined to set up "precise guidelines" (*Id.* at p. 375) suggesting instead a balancing test to be made by the trial court in deciding the motion. The factors to be balanced were almost identical to those enumerated in the federal cases discussed above which were in fact specifically cited in the *Sandoval* opinion.

In the case at bar, the trial court was made aware of petitioner's eight prior convictions. Application was made

to preclude inquiry thereon only *after* petitioner had taken the stand and completed direct examination. The trial judge exercised his discretion by precluding inquiry into the oldest conviction—one rendered in Virginia in 1938 for concealing a weapon. Of the seven others into which inquiry was permitted, at least four were petit larceny and none was for robbery. Petit larceny is clearly the type of crime which reflects directly "on a man's honesty and integrity." However, it is not so closely related to the crime of armed robbery as to raise a substantial danger that revealing it would indicate a criminal propensity to commit the latter crime. *Davis* v. *United States*, 433 F. 2d 1222, 1226 (D.C. Cir. 1970).

The petitioner herein fully related his version of the events of the night in question and his testimony was in clear conflict with that of Espino. In such cases which narrow "to the credibility of two persons—the accused and his accuser—. . . there [is] greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses [is] to be believed." *Gordon* v. *United States, supra*, at p. 941. See, also, *United States* v. *McDonald*, 481 F. 2d 513, 514 n.1, (D.C. Cir., 1973).

It is therefore our respectful submission that the trial court did not abuse its broad discretion in allowing inquiry into seven of the petitioner's eight prior convictions. This is especially true in light of the fact that the court instructed the jury many times that information regarding prior convictions was relevant only on the issue of petitioner's credibility (289-290, 339, 435-436).

In any event, the gravamen of petitioner's claim is that the trial court simply abused its discretion. He does not

assert that as a result of the alleged abuse a constitutionally protected right was abridged. Indeed, this court has specifically held that the introduction of evidence of a defendant's prior convictions under proper limiting instructions is not violative of the Constitution. *Spencer* v. *Texas*, 385 U.S. 554 (1967). There is therefore no proper basis upon which a Writ of Certiorari can or should issue from this Court. 28 U.S.C. Sec. 1257(3).

POINT II

The trial court's failure to authorize the employment of an investigator at public expense under the facts of the case, did not deprive appellant of the equal protection of the law. Further, the court's refusal to order a jury view was not error.

After the case for the People was concluded, the petitioner moved for the appointment of an investigator at public expense or in the alternative, for an order permitting a jury view of the schoolyard in question (256, 260).

Section 722-c of the County Law of New York provides in relevant part:

> "Upon a finding.. . . . that investigative . . . . services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel . . . to obtain the services on behalf of the defendant."

It is of course fundamental that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense . . . when those tools are available for a price to other prisoners" *Britt* v. *North*

Carolina, 404 U.S. 226, 227 (1971). However, "the outer limits of that principle are not clear . . ." *Id.* at p. 227.

Respondents do not dispute petitioner's claim that he was indigent and could not afford to pay for investigative services. Certainly, an affluent prisoner could have secured such services on his own. A defendant is of course free to spend his money in any way he sees fit in connection with his case whether actually necessary or not.

However, the New York statute providing for the expenditure of state funds on behalf of an indigent defendant requires a preliminary showing of the necessity therefor, i.e., that the services requested in fact constitute a "basic tool" for his defense. Respondents submit that such a requirement does not offend the Constitution, for the Equal Protection clause does not secure for an indigent defendant the right to spend state funds in any and every way that an affluent but imprudent defendant might squander his own. C.f. *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

The degree of necessity required to be shown has been varyingly described. Our Court of Appeals has required the employment of experts at state expense "where expert testimony is crucial to an indigent's proper defense" *People* v. *India*, 32 N.Y. 2d 230 (1973), cert. denied 414 U.S. 850. In *Bradford* v. *United States*, 413 F. 2d 467, 475 (5th Cir. 1969), the court held that the failure to appoint an expert was error "since expert testimony could have been decisive on all counts."

As was said in *United States* v. *Schultz*, 431 F. 2d 907, 910 (8th Cir. 1970):

> "In evaluating [such a] request, the trial court may consider the nature and effect of the evidence

> proposed by the defendant—whether material or not, whether cumulative or not. The trial court possesses a board discretion to grant or deny [such an] application."

Similarly, the ordering of a so-called "jury view", suggested as alternative relief by the petitioner below, is also within the sound discretion of the trial judge under New York law. Section 270.50(1) of the Criminal Procedure Law provides:

> "When the court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed, or of any other premises or place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of summations, order that the jury be conducted to such premises or place for such premises or place for such purpose in accordance with the provisions of this section."

In the case at bar, the court in response to the petitioner's application, pointed out that he had failed to ask for the services of an investigator during the many months between arrest and trial (259). The court indicated that the application would be considered solely as one for a jury view and invited the petitioner to state any reason he could give to show that such a jury view would serve the interests of justice (261).

The petitioner replied that he wanted the jury to see the structure of the schoolyard and the lighting thereof at the time of day at which the incident occurred. He stated that he wanted to avoid being forced to take the stand to put that information before the jury (261-262).

The court responded that it had already been elicited that the schoolyard had been dark and that neither Espino nor Gavagan had seen petitioner's face while he was in the yard before his apprehension. The court indicated that no satisfactory showing of necessity had been made and denied the application (267-268).

Thereafter the appellant did in fact take the witness stand but made no mention of either the "structure" or the lighting conditions of the schoolyard.

We respectfully submit that the court properly exercised its discretion in refusing to appoint an investigator or order a jury view in the absence of a showing of a legitimate need therefor. The petitioner's right to the equal protection of the law was not infringed by the court's ruling.*

POINT III

The court's charge on the requirement of proof beyond a reasonable doubt was proper.

At 405, the court charged:

> "The burden of proving the guilt of a defendant beyond a reasonable doubt rests at all times upon the prosecution. Evidence which is evenly balanced is naturally not beyond a reasonable doubt. If evidence is as consistent with innocence as it is with guilt, the defendant is entitled to the innocent construction and he must be acquitted."

Petitioner contends that this language "must have been understood by the jurors as creating a preponderance of

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* Compare for example the clear need for investigative assistance set forth in *People* v. *Irvine*, 40 App. Div. 2d 560 (2d Dept. 1972).

the evidence standard" (Petition, POINT III, at p. 15). It is presumably petitioner's view that this alleged error deprived him of the right to a fair trial guaranteed him by the Fourteenth Amendment. We must respectfully disagree.

In addition to the above-quoted language, the trial court charged the jury with the definition of reasonable doubt specifically approved by this Court in *Holt* v. *United States*, 218 U.S. 245, 254 (1910). The court charged:

> "A reasonable doubt is an actual doubt that the jury is conscious of having after going over in their minds the entire evidence of the case, giving consideration to all the testimony and to each and every part of it. If then you feel uncertain and not fully convinced by the evidence or lack of evidence that the defendant is guilty of the crime charged, and if you believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, and if you entertain it, the law commands you to give it to the defendant and he must be acquitted." (405-406)

Further, in referring to the burden of proof carried by the People on the question of petitioner's guilt, the court used the words "beyond a reasonable doubt" some thirty times."*

It is respectfully submitted therefore that the burden of proof borne by the People was properly explained to the jury and petitioner was not deprived of a fair trial by the court's charge.

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* See 375, 387, 393, 394, 395, 399, 400, 402, 403, 404, 405, 415, 437, 440, 442, 443, 444, 445, 447.

POINT IV

The unavailability of the People's opening statement does not render petitioner's conviction constitutionally defective.

Without apparent reason, the court reporter failed to record the District Attorney's opening statement. That fact is certainly unusual and respondents concede that such failure constitutes bad practice. However, we respectfully submit that it does not render the conviction herein constitutionally defective.

Rarely is a judgment of conviction reversed on the grounds that the prosecutor's opening statement was defective or prejudicial. Cf. *People* v. *Mantesta*, 27 App. Div. 2d 748 (2d Dept. 1967). In the case at bar, according to a statement transmitted by the court reporter to counsel for petitioner, no objection was made during the People's opening. (Petition, footnote at p. 17).

It should also be noted that in its preliminary remarks, the court informed the jury that the prosecutor was compelled by law to make an opening statement and specifically cautioned that nothing contained in such statement was to be considered as evidence in the case (4, 10).

Most importantly, petitioner makes not the slightest suggestion of anything in the People's opening that might have constituted arguable grounds for allegations of constitutional error. This is so notwithstanding the fact that presumably Mr. Weeks and Mr. Nathanson, trial counsel, are available to suggest such grounds. Without an attempt at such a showing, respondents submit that the presumption of regularity which attaches to the proceedings herein

has not been overcome in respect to the prosecutor's opening statement. See e.g. *People* v. *Bell*, 36 App. Div. 2d 406 (2d Dept. 1971), aff'd 29 N Y 2d 882.

POINT V

Any error herein which this Court may determine to be of constitutional dimension should be adjudged harmless in view of the overwhelming proof of petitioner's guilt adduced at trial.

Should this Court find that petitioner has in fact presented substantiated errors of constitutional dimension herein, respondents respectfully submit that the issuance of a Writ of Certiorari would be improvident in view of the overwhelming proof of petitioner's guilt presented at trial:

Espino and Gavagan testified that petitioner was apprehended in flight moments after the robbery. He had in his possession stolen property including Espino's watch and religious medallion. Petitioner never contended that the robbery had not occurred but simply asserted that he had not committed it. He explained his possession of the knife and gave a version of how Espino's wallet was recovered.

He failed, however, to account for the recovery of Espino's watch and religious medallion and merely denied having had those items in his possession. The inescapable inference to be drawn from his testimony would be that Espino had indeed been robbed of his wallet, but either had lied when he claimed that the watch and medallion had also been stolen or had recovered those items in some other

way. Gavagan would have had to have been a party to Espino's lie.

It is respectfully submitted that the charges against the petitioner were fairly presented to the jury as were his responses thereto. On all the evidence, the jury was justified in finding that petitioner's guilt had been proven beyond a reasonable doubt by overwhelming evidence.

Respondents respectfully submit that the errors complained of, if errors they were, did not contribute to the verdict of guilt rendered herein and therefore should be considered harmless. *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972); *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967).

CONCLUSION

For the reasons outlined above, the Petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, New York
October, 1974

Respectfully submitted,

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